UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 34

CURRAN, BERGER, & KLUDT **Employer** **and** **UNITED AUTO WORKERS LOCAL 2322** **Petitioner**	**Case 01-RC-269805**

DECISION AND DIRECTION OF ELECTION

Curran, Berger, & Kludt ("Employer" or "CBK") is an immigration law firm based in Northampton, Massachusetts. The Petitioner, the United Auto Workers Local 2322 ("Union" or "Local 2322"), seeks to represent a unit of all full-time and regular part-time immigration specialists, administrative assistants, front office interns, senior administrators, writers, paralegals, senior paralegals, senior paralegals/team leaders, interns, and technical specialists, excluding managers, guards, professional employees, and supervisors as defined by the Act. The Employer seeks to exclude all paralegals, senior paralegals, and senior paralegal/team leaders as "confidential employees."[1] It further maintains that Local 2322 should be disqualified from representing the unit in its entirety because it already represents employees of certain CBK clients, creating an irreconcilable conflict of interest.

A hearing officer of the Board held a hearing in this matter on December 30, 2020.[2] As described below, based on the record and relevant precedent, I find that the petitioned-for unit is appropriate and that Local 2322 may properly represent it. Accordingly, I direct an election in that unit.

[1] The petitioned-for unit presently consists of 33 employees of which 14 are paralegals, one is a senior paralegal, and one is a senior paralegal/team leader.

[2] All dates are in 2020 unless otherwise specified.

Summary of Record Evidence

Overview of Employer Operations

CBK operates an immigration law firm that services a range of clients, including colleges, universities, medical schools, hospitals, other health care facilities, and various private companies. Approximately two-thirds of the firm's work is counseling client employers that are sponsoring employees for temporary or permanent permission to remain in the United States and overseeing resultant visa applications. The remaining one-third of CBK's practice focuses on family and humanitarian immigration work.

The firm is a partnership between three attorneys. They oversee one associate attorney, four case managers, two immigration specialists, two interns, and an office manager. The four case managers, in turn, oversee specialized teams consisting variously of paralegals, senior paralegals, letter writers, immigration specialists, interns, office managers, administrative assistants, and front office administrators. One team focuses on large corporate and university clients; one on smaller academic institutions; one on family and humanitarian work; and one on small to midsize employers, hospitals, and medical practices. All teams are staffed with at least one attorney, case manager, and paralegal.

Overview of Paralegals' Responsibilities

The paralegals[3] on each team serve as "point people" for clients. An attorney decides which paralegal to assign to a given matter, sometimes considering paralegals' interest in an issue (as opposed to a client). Thereafter, paralegals assist with case strategy and client communication, performing a significant amount of research and writing. Because of the amount of client-communication, research, and writing required of CBK paralegals relative to what may be typical at other firms, CBK hires liberal arts graduates to fill the role. However, paralegals cannot and do not provide legal advice. Rather, they serve as intermediaries between clients and a responsible attorney. In that capacity, they frequently receive and relay client questions, draft responses based on an attorney's instructions, and convey those responses to the client. Paralegals also will assist attorneys with spotting potential issues with a client's visa application by reviewing questionnaires early in the process. They help prepare visa

[3] Throughout this decision, any reference to "paralegals" shall be shorthand for paralegals, senior paralegals, and senior paralegal/team leader, which are the three classifications the Employer seeks to exclude on the theory that they are "confidential employees."

applications based on the attorney's instructions and then help advance and monitor those applications.

Paralegals are privy to client files and communications. Each team has access to confidential information about other teams' matters. Accordingly, CBK provides confidentiality training to them as well as to other support staff. However, paralegals are not involved in CBK's internal employment and labor issues. Internal restrictions prevent them from accessing documents related to each other's employment at the firm.

CBK's Immigration Work and Paralegals' Role Therein

In its representation of private and public universities, CBK handles a significant volume of temporary, non-immigrant H-1B and 0-1 visas for foreign workers as well as immigrant visas, commonly referred to as green cards, for faculty and teachers seeking permanent residency in the United States. The firm assists client employers and applicants with securing a visa by making appropriate filings, answering questions, and ensuring compliance with federal agency guidelines throughout the visa application process and thereafter.

By way of example, the process for obtaining an H-1B visa requires filings with the Department of Labor ("DOL") and with U.S. Citizenship and Immigration Services ("USCIS"). The DOL filing includes attestations from the client employer that it will pay a fair salary to the visa applicant, that it will treat the applicant similarly to other employees, that no strike or work stoppage presently exists, and that a notice has been given to employees (or the bargaining unit if there is one). The notice provides existing employees an opportunity to raise concerns or objections about the hiring of an international worker. Paralegals provide this notice to the client employer to share with employees or, when the employees have a bargaining representative, to a union agent to do the same. At this stage, a union could object on behalf of the unit to the hiring of a foreign worker. However, it is undisputed that Local 2322 has never done so. Paralegals also compile and provide the client employer with a "public access file" that it must maintain in case of a government audit of the process. This file includes, among other things, a record of the DOL notice to employees and the formula used to determine the prevailing wage offered to the foreign worker. Once the DOL filing has been certified, the firm files the appropriate visa application with USCIS. Paralegals assist with drafting and monitoring these applications.

Throughout the visa application process, CBK commonly engages in a dual representation of the client employer and the visa applicant because the two parties are working toward the common goal of obtaining authorization for the applicant to remain in the United States. As a result, the firm does not maintain confidentiality between the client employer and applicant. However, during a dual representation, the clients' interests may diverge, for example, when the visa applicant wishes to travel and the client employer objects because of the risk the employee might be delayed in returning. The firm therefore provides appropriate disclosures about the potential for a conflict of interest at the beginning of any dual representation matter. If a conflict of interest arises, the firm may have to withdraw from representation. Frequently, it will continue to represent both clients while counseling each on possible outcomes and facilitating a mutually agreeable resolution. Such scenarios—and other issues—can happen at any point during a three-year visa term. Accordingly, and to make additional required filings, CBK must remain in touch with clients throughout the application process and thereafter. Paralegals serve as point people in this regard, issue spotting for attorneys and relaying questions and advice.

Local 2322 Involvement with CBK Clients

Local 2322 represents certain employees of CBK's clients, principally graduate and post-doctoral students at the University of Massachusetts at Amherst ("UMass Amherst").[4] CBK handled approximately ten H-1B visa applications for UMass Amherst graduate and post-doctoral students in the last two years and perhaps 35 to 40 since UMass Amherst became a client in 2012. The Union does not provide advice on immigration law to members, including at UMass Amherst, nor does it presently represent any bargaining units at immigration law firms. CBK does not provide counsel to the Union about immigration matters. It provides counsel to its client employers and individual visa applicants who may be or become members of a bargaining unit that Local 2322 represents.

[4] Local 2322 also represents employees at CBK clients Mount Holyoke and Providence Behavioral Health. It represents housekeepers at Mount Holyoke and certain non-professional staff at Providence Behavioral Health. Because the firm primarily assists with professional visas, it does not generally represent Local 2322 members at these institutions. The only exception on the record is that it has helped a few Mount Holyoke housekeepers retain temporary status following recent changes to immigration law.

The collective bargaining agreement between UMass Amherst and UAW Local 2322 contemplates the hiring of foreign workers. Certain terms are relevant to CBK's work processing visa applications. For example, the contract stipulates that UMass Amherst will ensure that no postdoctoral employees will lose pay due to its failure to "timely process" work authorizations.[5] The firm must also draw upon the contract's wages and benefits provisions to determine the appropriate pay for the sponsored worker and draft relevant paperwork.

Other sections of the contract may become relevant to the firm's immigration work over the course of a visa term. For example, UMass Amherst's invocation of provisions governing discipline, dismissal, and lay-offs could implicate a visa recipient's status.[6] Similarly, the firm must advise a client employer and visa recipient if a grant financing the recipient fails to come through. The resolution could involve pursuing a different type of visa, switching the employee to part-time status, or changing the employee's classification such that the individual would no longer be a unit employee. CBK partner Dan Berger posited that Local 2322 might object to a chosen course of action. Additionally, the contract with UMass Amherst includes a grievance and arbitration procedure which could be implicated in scenarios involving graduate or postdoctoral foreign workers, including their discipline, discharge, or layoff. Local 2322 would, of course, be involved with such grievances. In the event of a contract violation, a union representative would first speak with the university's labor management representative and could file a grievance if the discussion does not resolve the issue. The Union's Executive Board would discuss any such grievance. Its Joint Council, consisting of representatives from the Union's different bargaining units, would subsequently vote on whether to take the grievance to arbitration. The Joint Council presently has 14 seats. If Local 2322 is certified to represent a unit at CBK, employees in that unit would be entitled to two additional seats.

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[5] Employer Ex. 6 (UMass Amherst collective bargaining agreement) ("The University will ensure that no postdoctoral employee shall suffer a loss in pay due to the University's failure to timely process work authorization paperwork, if there is a resulting delay in the post doc's beginning date of employment.").

[6] CBK partner Dan Berger testified that discipline and dismissal can affect immigration status because the visas in question are contingent on the recipients working for the sponsoring institution. A discipline or dismissal scenario would pose a conflict of interest within the dual representation of the client employer and visa recipient. The firm would need to withdraw representation or work collaboratively with the two clients on a mutually agreeable plan.

Finally, Berger testified that a union strike could theoretically preclude a visa recipient from commencing work or remaining in the country. Berger acknowledged, however, that the UMass Amherst contract contains a no-strike clause and that, in his twenty-four-year career, he has encountered only two actual strikes for any client.

Testimony of Union Witnesses

Witnesses associated with the Union provided testimony largely refuting any insinuation of a conflict of interest or that a union member would be more likely to disclose confidential information than an unrepresented employee. Local 2322 President Anais Surkin testified that, in the nearly eight years since the Union has represented graduate and post-doctoral students at UMass Amherst, it has never come close to a strike. In fact, the Union's members at UMass Amherst and more broadly work predominantly in the public sector, rendering strikes illegal. Surkin acknowledged that, in the event of a strike, the Union might "encourage" members at other employers to show support but maintained that it would not require any particular action. To that end, Surkin attested, without contradiction, that she would not and has never encouraged a member to be disloyal to an employer or to disclose confidential information. Further, she noted that the Union has never conducted a trial of a member for conduct unbecoming or for any other reason.

Senior Paralegal Jonah Vorspan-Stein corroborated Surkin's view. He is already a dues-paying member of Local 2322 by virtue of his dual employment with CBK and UMass Amherst, where he is pursuing a degree in labor studies and a masters in sustainability science.[7] His uncontradicted testimony was that he never divulged confidential information gleaned through his employment with CBK to the Union and would not do so. He also attested, without contradiction, that his union membership has not interfered with his work for CBK.

Employer's Position

Employer's Position that CBK Paralegals are "Confidential Employees"

CBK maintains that paralegals are "confidential employees" who should be excluded from the petitioned-for bargaining unit. To that end, it argues that paralegals' work is

[7] CBK has sponsored Vorspan-Stein's employment with UMass Amherst for the past year and a half as part of an externship program. He works for CBK 30 hours a week and in the externship at UMass Amherst for 10 hours a week. CBK pays about $7,000 to UMass Amherst to finance a stipend for him.

inextricably linked to labor issues and that they are privy to and part of attorney-client communications in which the firm helps clients formulate, determine, and effectuate labor relations policies as they pertain to the employees' immigration status. Specifically, CBK argues that paralegals communicate with labor management representatives about such issues as the determination and payment of wages and benefits to foreign workers. They also provide DOL notices to Local 2322 and communicate directly with it about wages and benefits compliance. CBK urges that, because timely processing of visa applications is part of the UMass Amherst contract with Local 2322, CBK paralegals are effectively acting as an extension of UMass Amherst's internal labor management staff in working to fulfill that contractual obligation.

CBK further argues that paralegals have regular access to confidential information that has a "labor-nexus," including relaying advice on scenarios that might not comport with the UMass Amherst collective bargaining agreement. These topics include wages paid to visa recipients, the impact of a visa recipient teaching at another location, removing a visa recipient from payroll, transferring a visa recipient to another department, a recipient's travel abroad, and payment of the immigration processing fees. CBK contends that, because clients will seek advice before speaking with the Union, paralegals are aware of such information before the Union is, thereby creating a risk that they will violate the attorney-client relationship. CBK urges that paralegals should be excluded as confidential employees because of this participation in attorney-client confidential labor relations matters.

In support of its argument, CBK relies on *Foley, Hoag, & Eliot*, 229 NLRB 456 (1977). In that case, the Board recognized the right of law firm employees to organize but indicated that there may be some circumstances in which "self-organization of a law firm's staff some way conflict with [the attorney-client] relationship" such that they could be excluded from a bargaining unit as "confidential employees." *Id.* at fn. 12. Relying on this reasoning, CBK seeks to distinguish other Board precedent holding that certain law firm staff are not "confidential employees." For example, although the Board in *Kleinberg, Kaplan, Wolff, Cohen & Burrows*, 253 NLRB 450 (1981) and *Stroock & Stroock & Lavan*, 253 NLRB 447 (1980) held that certain law firm clerical and support staff were not confidential employees, CBK maintains that its paralegals are privy to confidential labor-management information and discussions with clients that were not at issue in those cases and that justify their exclusion from

any bargaining unit under the rationale in *Foley*.[8] On the same basis, it distinguishes the decision in *Dun & Bradstreet*, 240 NLRB 162 (1979), in which the Board refused to apply the confidential exclusion to credit reporters who had access to confidential labor information of clients. CBK notes that, unlike credit reporters, paralegals have a fiduciary relationship with clients and cannot fulfill such ethical obligations as preserving confidential attorney-client information, zealously advocating for the client's interests, and avoiding conflicts of interest while also being union members. It maintains their fiduciary position precludes paralegals from sitting on Local 2322's Joint Council which decides actions adverse to CBK clients such as arbitrating grievances.

Employer's Position that Union Cannot Represent Unit Due to Conflict of Interest

CBK maintains that the Union is disqualified from representing the petitioned-for unit in its entirety because it would have a conflict of interest regarding its representation of CBK unit members and those of CBK clients. In particular, it argues that the UMass Amherst contract imposes an obligation of "timely processing" work authorization paperwork on CBK paralegals. It reasons, if a CBK employee fails to process paperwork on behalf of a UMass Amherst-sponsored visa applicant, the Union would have a conflict of interest in either processing a grievance on behalf of the paralegal who may have failed to timely process the application or processing one for the visa applicant whose filings have been delayed. It states, "[t]he conflict is irreconcilable. By filing the grievance to support the post-doctoral employee, UAW Local

[8] In this vein, CBK relies on the Board's decision in *Hoover Co.*, 55 NLRB 1321 (1944) in support of this position that employees handling labor relations matters are "confidential employees." In *Hoover*, the Board held that the confidential exclusion is appropriate to prevent management from having to "handle labor relations matters through employees who are represented by the union with which the Company is required to deal and who in the normal performance of their duties may obtain advance information of the Company's position with regard to contract negotiations, disposition of grievances, or other labor relations matters." *Id.* at 1323. In that case, the employees at issue prepared confidential instructions regarding employees' overtime allowances, earning adjustments, and rate change requests, communications between members and management, and memoranda related to grievance investigations and other labor relations matters. *Id.* at 1322-23. As discussed further below, this case and others relied on by CBK, involve employees involved in labor relations for their own employer, not a third-party employer.

2322 may adversely impact the CBK employee. By refusing to file the grievance, UAW Local 2322 may be adversely impacting the rights of the post-doctoral employee."

Additionally, CBK argues that the Union may have a conflict of interest in representing CBK employees relative to members of other units at the bargaining table. For example, CBK wonders whether proposals on workloads for CBK staff, workhours and after-hours availability in emergencies, requests for overtime and premium pay, and layoff procedures would be truly for the benefit of CBK employees or members of other units who might be impacted by such policies. CBK posits that Local 2322 might seek priority in the handling of petitions for its members or be less willing to propose terms that make it more difficult or expensive for CBK to perform its immigration services out of concern for other constituents. In support of this argument, CBK relies on Board precedent in which a union was disqualified for having interests at cross purposes to a petitioned-for unit. *See, e.g.*, *Bausch & Lomb Optical Co.*, 108 NLRB 1555, 1559 (1954) (finding a conflict of interest in a union's competing business); *St. John's Hosp. & Health Ctr.*, 264 NLRB 990, 992 (1982) (finding that a union's customer relationship creates "an 'ulterior purpose' that conflicts with the requirement that a collective-bargaining agent have a 'single-minded purpose'" in representing a unit of employees); *Oregon Teamsters*, 119 NLRB 207, 211-12 (1957) (holding a union was not a proper representative of employees due to a conflict of interest stemming from numerous unfair labor practice charges between competing factions of the union).

Finally, CBK maintains that conflicts of interest may also exist for paralegals because they are privy to communications with UMass Amherst about union-represented visa recipients. CBK maintains such conflicts could arise when visa recipients seek to change or maintain their work authorization in a manner that conflicts with the UMass Amherst contract; work for a different academic institution which could lead to immediate expulsion and return home without time to resort to the grievance and arbitration procedure; change job classifications to non-unit positions; experience delayed travel or seek travel the employer does not wish to permit; or are disciplined, terminated, or laid-off. Likewise, although UMass Amherst has a no strike clause, CBK paralegals could become privy to discussions of potential or actual strikes by other clients where Local 2322 represents workers whose immigration status could be impacted by such a step. To that end, CBK notes that the Union's bylaws require members to be loyal to the organization, which creates a conflict with paralegals' duty to CBK clients. CBK maintains that

Local 2322 might "encourage" its members to join a picket line in solidarity against a CBK client. Further, unit employees at CBK would be entitled to seats on the Union's Joint Council and would therefore have two votes about whether to proceed to arbitration, including on grievances that could involve CBK clients and/or reflect on their own work performance in timely processing visa applications for Local 2322 members at UMass Amherst.

Union's Position

Union's Position that Paralegals are not Confidential Employees

The Union rejects the contention that paralegals are "confidential employees" within the meaning of Board precedent. In particular, it notes that the Board has purposefully created a narrow exception to the statutory right to organize which applies only to employees who are privy to labor-confidential information related to their own employer, as opposed to limited information about labor issues for a third-party employer. It cites *Kleinberg* as precedent that specifically rejects CBK's argument that the narrow exclusion should be extended to law firm employees privy to clients' labor concerns. *See* 253 NLRB at 457. It notes that the Board explicitly held in that case that a "confidential employee" was one who "formulates, determines, and effectuates labor relations policies for their own employer, not some other employer." *Id.*

Moreover, the Union notes that no evidence exists on the record that any CBK employee would breach confidentiality simply because they were represented by Local 2322. It argues that the record supports the contrary conclusion, pointing to testimony from a union leader that she would never require an employee to be disloyal to his employer as well as from a current employee of CBK who is already a member of Local 2322 that he has not and would not share client confidences.

Union's Position on Conflict of Interest Issue

The Union maintains that no conflict of interest precludes it from representing paralegals at CBK. It argues that the Board has squarely rejected the idea that union membership creates a conflict of interest for employees who are privy to confidential client information. It notes that the Board, in *Dun & Bradstreet*, 240 NLRB 162 (1979), dismissed the premise that credit reporters with access to confidential business information of third parties with bargaining relationships to the petitioning union would face divided loyalties and potentially share such information with their union. In that case, the Board found that union membership was

compatible with an employee's duty of loyalty to an employer, including the duty to maintain confidentiality.

As to specific alleged conflicts, the Union maintains that it has never objected to labor certifications following a DOL notice to employees and that any hypothetical disputes involving non-immigrant workers would arise under the CBA, not immigration law. It notes that paralegals' role in providing notices to the Union creates no special knowledge because the notice and its contents are public documents. Moreover, it argues, the Employer could simply disclose any conflict that arises in other scenarios and move forward.

In short, the Union does not dispute that there is a legal duty of confidentiality or diligence that paralegals must follow, an extension of the professional rules governing lawyers. Rather, it urges that there is nothing in union membership that would compromise paralegals in discharging those duties. It points out that union membership is entirety voluntary and that labor law would preclude any paralegal from engaging in a partial strike by refusing to perform certain work due to a labor dispute.[9] Finally, it observes that Congress could categorically exclude law firm employees from the protections and rights afforded by the Act if it so chose, as it has done for other industries, but has not done so. Accordingly, it contends that the "confidential employee" exclusion should be narrowly, rather than categorically, construed with respect to law firm employees, including the paralegals in question here.

Analysis and Decision

Paralegals Are Not Confidential Employees

Since the earliest days of the Act, "the Board has consistently excluded from bargaining units as confidential employees persons who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." *B.F. Goodrich Co.*, 115 NLRB 722, 724 (1956). For nearly as long, the Board has also consistently made clear the dangers inherent to broadening that exclusion. The Board has explained:

> [B]roadening of the definition of the term 'confidential' . . . needlessly precludes employees from bargaining collectively together with other employees sharing

[9] *Vencare Ancillary Servs., Inc. v. N.L.R.B.*, 352 F.3d 318, 322 (6th Cir. 2003) (holding that partial strikes, where employees continue working on their own terms, are unprotected by Section 7 of the Act such that employees may not "refuse to work on certain assigned tasks while accepting pay or while remaining on the employer's premises").

> common interests. Consequently, it is our intention herein and in future cases to adhere strictly to that definition and thus to limit the term 'confidential' so as to embrace only those employees who assist and act in a confidential capacity to persons who formulate, determine, *and* effectuate management policies in the field of labor relations.

Id. at 724. Accordingly, the "confidential employee" exclusion is a narrow one. *Dun & Bradstreet*, 240 NLRB at 163. The relevant analysis looks "not to the confidentiality of information within the employee's reach, but to the confidentiality of the relationship between the employee and persons who exercise 'managerial' functions in the field of labor relations." *Ernst & Ernst Nat'l Warehouse*, 228 NLRB 590, 591 (1977). On that basis, the Board has held that secretaries to a personnel manager and office manager were confidential employees "because of the role in past and future bargaining negotiations assigned to the officials for whom they work,"[10] but that a secretary who had access to and typed documents related to confidential information, including some related to labor relations, was not.[11] Such precedent makes clear that an employee's access to confidential material—even if such information is confidential labor relations material—is insufficient to confer confidential status.[12]

In this case, CBK argues that paralegals have confidential status because they are bound by the attorney-client confidential relationship on matters that touch upon labor relations concerns. The Board has clearly held, however, that the attorney-client relationship does not generally preclude law firm employees from availing themselves of the rights afforded under the National Labor Relations Act.

In the years since first asserting jurisdiction over law firms in *Foley*, the Board has made clear that the same standard for determining an employee's confidential status applies as to other types of employers. For a law firm employee to be deemed "confidential," he or she must work in a confidential capacity to a person who determines, formulates, and effectuates labor

[10] *B.F. Goodrich,* 115 NLRB at 725.

[11] *Los Angeles New Hosp.*, 244 NLRB 960, 961 (1979); *see also United States Postal Service*, 232 NLRB 556 (1978) (holding that typing of confidential labor relations memoranda does not, without more, imply confidential status).

[12] *Ernst & Ernst Nat'l Warehouse*, 228 NLRB 590, 591 (1977).

policy "for their own employer, not some other employer."[13] The record in this case is devoid of evidence that the paralegals in question have access to or act in a confidential capacity to CBK's internal employment and labor concerns. In fact, the record reflects the contrary: paralegals lack access to their colleagues' employment files and are not involved in CBK's internal labor and employment decisions.

CBK's arguments hinge on the special nature of the attorney-client relationship, which is both confidential and fiduciary. It maintains that paralegals cannot be represented by a union because that representation would risk violating that relationship. However, the Board has already considered and rejected such arguments. In *Kleinberg*, the Board squarely addressed the concern that union representation impairs attorney-client privilege. 253 NLRB at fn. 3. It stated "[w]e are not persuaded that employees of a law firm differ from other employees in a way that would justify carving out an exception to the principle that 'union membership is not incompatible with an employee's duty of loyalty owed to his or her employer, even when the duty involves a responsibility to maintain confidentiality.'"[14]

CBK also contends that paralegals are involved in communications and have access to information that have a labor-management nexus for CBK clients. To that end, it offers evidence of the various ways in which the firm's immigration practice implicates a labor relations concern. These examples, discussed in detail already, include their role in notifying a union agent about the employer's intention to hire of a foreign worker, identifying the proper

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[13] *Kleinberg, Kaplan, Wolff, Cohen & Burrows*, 253 NLRB 450 (1980) (quoting *Dun & Bradstreet*, 240 NLRB at 163).

[14] *Kleinberg*, 253 NLRB at fn. 3 (quoting *Dun & Bradstreet*, 240 NLRB at 163) (citing *Foley, Hoag, & Eliot*, 229 NLRB at 457, fn. 12)); *accord Stroock*, 253 NLRB at 447 (defining, in the context of a law firm, "confidential employees as those who 'assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations' . . . 'for their own employer, not some other employer'") (internal citations omitted); *see also Intermodal Transp. Servs.*, 244 NLRB 1044, 1045 (1979) ("Respondent has offered no evidence to show that the unit employees will not carry out their duties with the same degree of conscientiousness, integrity, loyalty, and responsibility that they did before their representation by the Union. Nor has Respondent indicated that it will adduce evidence showing that the Union will subvert the unit employees' honesty and their fealty to Respondent by pressuring them to conduct investigations of employees of other employers represented by the Union in a manner most favorable to the interests of those employees. Absent such evidence, we find no merit to Respondent's contention that a conflict of interest will be created by the Union's representation of Respondent's employees.").

pay rate for a foreign worker, and receiving or relaying advice from counsel on a foreign worker's discipline, work classification changes, and travel. Certainly, the record makes clear that immigration law will at times and perhaps frequently implicate labor issues. However, the same could readily be said of many areas of legal practice. Labor relations is inextricably intertwined with all areas of any organized employer's operations. Accordingly, to avoid disenfranchising nearly all law firm employees from exercising their Section 7 right to organize, the Board in *Kleinberg* squarely rejected the identical argument that CBK advances. *See* 253 NLRB at fn. 3. The law firm in that case maintained that some of its employees were confidential because they had access to confidential information in their roles supporting nonlabor practices, including securities, employee compensation, and immigration, that the employer maintained were "entwined inextricably" with the client's labor relations. *Id.* The Board concluded that "evidence of the Employer's nonlabor relations practice is irrelevant to establish a basis for treating it differently from law firms generally."[15]

In sum, CBK's effort to distinguish Board precedent is unavailing. Although paralegals were not among the classifications in prior Board decisions involving law firms, CBK has not demonstrated that paralegals are more likely to divulge client confidences, including attorney-client confidences, than the classifications at issue in those cases. Moreover, CBK has not sustained its burden of showing that its paralegals are involved in labor relations matters for their own employer, as opposed to a third-party. This standard is not satisfied by evidence that paralegals incidentally refer to a client's collective bargaining agreement in the course of their work or are privy to advice on individual matters involving a bargaining unit member. Like the classifications in prior decisions, CBK paralegals simply have access to certain confidential information related to labor relations and are involved in drafting and relaying communications that touch upon labor concerns. In all instances, such work is for a third-party client employer

[15] *Kleinberg*, 253 NLRB at fn. 3 ("In the alternative the Employer argues, citing [*Foley*] that the nature of its practice brings it within the "certain unusual situations" which might justify treating a law firm's employees differently from other groups of employees. To support its contention, the Employer adduced evidence of its nonlabor relations practice (i.e., securities, real estate, immigration, trade regulation, corporate, bankruptcy, and employment compensation), alleging that the services it renders in these areas are entwined inextricably with the labor relations of its clients. We conclude that the Employer has failed to justify departure from the general principle that law firm employees will not be treated differently under the Act from comparable groups of employees.").

and has no relationship to their own employer's labor concerns. The evidence therefore does not support any departure from well-established Board precedent.

Accordingly, I find that paralegals are not "confidential employees" and are properly included in the petitioned-for unit.

No Conflict of Interest Precludes the Union from Representing the Unit

It is well-established that a union may not represent a unit of employees if a conflict of interest exists that would jeopardize good-faith collective bargaining between the union and the employer. *See Bausch*, 108 NLRB at 1560-61. However, due to the strong public policy favoring employees' free choice of bargaining representative, "the employer bears the burden of showing that such a conflict of interest exists, and that burden is a heavy one." *Garrison Nursing Home*, 293 NLRB 122, 122 (1989). Because employees' choice "is not lightly to be frustrated" an employer seeking to disqualify a union as bargaining representative bears the "considerable burden . . . [of] showing that danger of a conflict of interest interfering with the collective bargaining process is clear and present." *Id.* at 122 (quoting *Quality Inn Waikiki*, 272 NLRB 1, 6 (1984), *enfd.* 783 F.2d 1444 (9th Cir. 1986) (citing *NLRB v. David Buttrick Co.*, 399 F.2d 505, 507 (1st Cir. 1968)). In that regard, the Board has disqualified unions from representing a bargaining unit "only with those conflicts of interest which tend to impair a labor organization's ability to single-mindedly pursue its employees' best interests." *Am. Arbitration Ass'n*, 225 NLRB 291, 292 (1976). Accordingly, the Board has held that a conflict of interest precludes a union from representing a unit of employees when a union operated a business in direct competition with the employer,[16] the employer was a customer of a union business,[17] the employer served as the union's legal counsel,[18] and the employer was a union seeking

[16] *Bausch*, 108 NLRB at 1559; *Visiting Nurses Ass'n, Inc. Serving Alameda Cty.*, 254 NLRB 49 (1981); *see also Harlem River Consumers Coop., Inc*., 191 NLRB 314 (1971) (refusing to certify union until its business agent divested of a financial stake in employer business).

[17] *St. Johns*, 264 NLRB at 992 (in which union operating a nursing registry service of which the employer was a customer).

[18] *Kaplan, Sicking, Hessen, Sugarman, Rosenthal & Zientz*, 250 NLRB 483 (1980) (employer violated Section 8(a)(1) and (2) of the act by recognizing union in this instance).

certification to represent its own employees.[19] In contrast, the Board has refused to override employees' choice of representative when the union's pension fund invested in a competitor of the employer's[20] and when the union was affiliated with organizations that were eligible to sit on the employer's board of directors[21] because the union had no direct financial interest at stake in either instance.

In this case, CBK argues that the union has a conflict of interest by virtue of its representation of employees of some of the firm's clients. It questions whether the Union can adequately represent a unit at the firm while also representing employees of these clients. It posits conflicts of interest that might arise in bargaining because increased costs or changes to work hours might flow downstream to negatively impact the client's employees; in the grievance and arbitration process should a UMass Amherst employee file a grievance about the timely processing of a visa application at the same time as a paralegal files a grievance over a discipline for dropping the ball on that same application; and in the event of a strike by CBK employees that might negatively impact foreign workers in other Local 2322 units, given that the Local would have to approve such a strike. All scenarios posited by CBK are plainly too speculative and indirect to satisfy the requirement that a conflict be "clear and present." *Garrison Nursing Home*, 293 NLRB at 122.[22] Likewise, any hypothetical conflict lacks the component of the union having a direct pecuniary interest adverse to its representation of CBK employees. Such an interest is the common thread in Board decisions that took the step of overriding employees' statutory right to free choice of bargaining representative. CBK has therefore failed to sustain its burden that the Union should be disqualified as bargaining representative for the unit at issue here.

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[19] *Oregon Teamsters'*, 119 NLRB at 211-12 (union not competent to bargain with itself concerning the terms of employment of its own employees).

[20] *David Buttrick Co*., 167 NLRB 438 (1967).

[21] *Am. Arbitration Ass'n*, 225 NLRB at 292.

[22] Moreover, specifically as to the grievance example, CBK imagines the handling of grievances as a zero-sum game in which processing one grievance would necessarily precludes processing the other. In practice, the theories and bases of the two grievances likely would be quite different and mutually exclusive.

CBK also argues that its employees would become subject to an irreconcilable conflict of interest should they be represented by Local 2322. For example, CBK posits that unionized employees might be privy to information adverse to the Union such as advice that conflicts with UMass Amherst's contract with Local 2322. This argument largely reiterates the reasoning CBK advanced that paralegals are "confidential employees." It is therefore disposed via the same rationale.[23] *Am. Arbitration Ass'n*, 225 NLRB at 292 ("We are likewise unwilling to presume that union representation will in any way interfere with the . . . employees' strict adherence to the highest principles of confidentiality and trust."). CBK also argues that employees could face conflicts of interest in their role on the Union's Joint Council because they will be called to vote on whether to take a grievance involving a CBK client to arbitration, which is contrary to their ethical and fiduciary responsibilities to that client and which might highlight their own misconduct. While it is true that CBK employees are entitled to two seats on the Joint Council, they could easily resolve any ethical conflict by recusing themselves from the decision.[24] The evidence of conflicts of interests and ethical concerns which CBK put forth therefore fail to satisfy its high burden of depriving employees of their choice in collective bargaining representative.

In short, I find that the Union may properly represent the employees in the petitioned-for unit.

Conclusion

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The rulings at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

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[23] Although the Union bylaws indicate that a member must be loyal to the organization, the uncontradicted record evidence is that the Union would not read this term as requiring members to be disloyal to their employer and indeed has never tried a member for conduct unbecoming.

[24] Given that the Joint Council already has 14 voting members, in many cases, the employees' two votes regardless may prove "too dilute and remote to divert the Petitioner from its statutorily prescribed duty of representing employees." *Am. Arbitration Ass'n*, 225 NLRB at 292.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time immigration specialists, administrative assistants, front office interns, senior administrators, writers, paralegals, senior paralegals, senior paralegals/team leaders, interns, and technical specialists; but excluding managers and guards, and professional employees and supervisors as defined the Act.

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the undersigned among the employees in the unit found appropriate in this Decision on the dates, times, place and manner set forth in the Notices of Election issued herewith. Employees will vote on whether they wish to be represented for purposes of collective bargaining by United Auto Workers Local 2322.

A. Election Details

The election will be conducted by United States mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit. At 5:00 p.m. on Friday, January 29, 2021, ballots will be mailed to voters by National Labor Relations Board, Subregion 34, Hartford Subregional Office. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Subregion 34 office by close of business on Friday, February 19, 2021.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by Monday, February 8, 2021 should communicate immediately with the National Labor Relations Board by either calling the Subregion 34 Office at (860) 240-3522 or our national toll-free line at 1-844-762-NLRB (1-844-762-6572).

Due to the extraordinary circumstances of COVID-19 and the directions of state or local authorities including but not limited to Shelter in Place orders, travel restrictions, social distancing and limits on the size of gatherings of individuals, I further direct that the ballot count will take place virtually, on a platform (such as Zoom, Skype, WebEx, etc.) to be

determined by the Acting Regional Director, at 2:00 p.m. on Monday, February 22, 2021. Each party will be allowed to have an observer attend the virtual ballot count.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Acting Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **Wednesday, January 20, 2021.** The list must be accompanied by a certificate of service showing service on all parties. **The subregion will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Subregion and served electronically on the other parties named in this decision. The list may be electronically filed with the Subregion by using the E-filing system on the Agency's website at www.nlrb.gov.

Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Acting Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Acting Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: January 19, 2021

Paul J. Murphy, Acting Regional Director
National Labor Relations Board
Subregion 34

Attachments